The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLUMBIA RIVERKEEPER, IDAHO RIVERS UNITED, SNAKE RIVER WATERKEEPER, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and THE INSTITUTE FOR FISHERIES RESOURCES, Plaintiffs, v. ANDREW WHEELER, *et al.* Defendants.	No. 2:17-cv-00289-RSM **PLAINTIFFS' OPPOSITION TO EPA'S MOTION FOR STAY PENDING APPEAL (Dkt. # 47)** (For Consideration Nov. 29, 2018)

Plaintiffs Columbia Riverkeeper *et al.* (collectively, "Riverkeeper") respectfully oppose Defendants' (collectively, "EPA") Motion for Stay Pending Appeal (Dkt. # 47) and ask the Court to deny the motion for the following reasons:

BACKGROUND

Riverkeeper brought this action to protect salmon and steelhead in the Columbia and Snake rivers from dangerously warm water temperatures. Specifically, Riverkeeper seeks to compel EPA to issue a long-overdue temperature "total maximum daily load" (TMDL) required under the Clean Water Act (CWA). The TMDL would create a temperature pollution budget for the Columbia and Lower Snake rivers to address water temperatures that exceed Washington and

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P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Oregon's water quality standards, thereby harming threatened and endangered salmon and steelhead.

This Court's October 17, 2018, order on summary judgement determined that "EPA [] violated the CWA by failing to issue a TMDL for the Columbia and lower Snake Rivers" after "Washington and Oregon [] clearly and unambiguously indicated that they will not produce a TMDL for these waterways." Dkt. # 39 at 14. The Court then gave EPA "30 days . . . to approve or disapprove the constructively submitted TMDL, and, if disapproved, 30 days after the disapproval to issue a new TMDL. *See* 33 U.S.C. § 1313(d)(2)." *Id.* at 15.

EPA recently disapproved Oregon and Washington's constructively submitted TMDLs in accordance with the Court's order. *See* Dkt. # 47-1. But rather than proceeding to issue the temperature TMDL within the 30-day deadline set by the CWA and the Court's order, or approaching Riverkeeper to negotiate a reasonable schedule for TMDL issuance as suggested by the Court, EPA is moving for an indefinite stay pending appeal.

Delay has been the hallmark of EPA's approach to the TMDL for the last two decades, and EPA's requests for additional delays have punctuated this litigation. There is no reason for further delay and every reason for swift action to protect Columbia and Snake river salmon and steelhead. Accordingly, the Court should deny EPA's motion for stay pending appeal.

ARGUMENT

I. Applicable Legal Standards.

"A stay pending appeal is always an extraordinary remedy." *Bhd. of Railway & Steamship Clerks v. N.M.B.*, 374 F.2d 269, 275 (D.C. Cir. 1966). That is because "[a] stay is an intrusion into the ordinary processes of administration and judicial review, . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). EPA seeks this stay to

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"maintain the *status quo ante*" (Dkt. # 47 at 2), even though "[m]aintaining the status quo is not a talisman" for the purposes of seeking a stay. *See Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). Indeed, it is the status quo—EPA's longstanding inaction despite warming rivers and dwindling salmon runs—that violates the CWA and harms Riverkeeper and imperiled fish species.

Courts in the Ninth Circuit consider four factors when presented with motions for stays pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.

Jordahl v. Brnovich, 2018 U.S. App. LEXIS 31057, No. 18-16896, at *1–*2 (9th Cir. Oct. 31, 2018) (quoting *Golden Gate Restaurant*, 512 F.3d at 1115 *and Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). As explained below, EPA meets none of these factors and fails to show any basis for a stay.

II. EPA is Unlikely to Succeed on the Merits.

Ignoring case after case to the contrary, EPA repeats its summary judgment arguments about the constructive submission doctrine and its applicability to a specific TMDL. Despite EPA's distaste for the constructive submission doctrine, EPA has not identified any "serious and difficult questions of law" to litigate on appeal. Dkt. # 47 at 4 (quoting *Costco Wholesale Corp. v. Hoen*, No. C04-360P, 2006 U.S. Dist. LEXIS 65774, at *7 (W.D. Wash. Sep. 14, 2006)).

EPA's tired attack on the constructive submission doctrine has not convinced a single appellate court since the doctrine was adopted over three decades ago by the Seventh Circuit in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). EPA's argument that the Ninth Circuit

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is likely to overturn the doctrine because it was created by "judicial gloss" (Dkt. # 47 at 3) is contrary to time-honored concepts of judicial interpretation and *stare decisis*. The Ninth Circuit expressly upheld relief granted under the constructive submission doctrine in *Alaska Center for the Environment v. Browner*, 20 F.3d 981, 986–87 (9th Cir. 1994), and has no compelling reason to revisit the longstanding doctrine.

Neither is the doctrine's applicability to a single TMDL unsettled, as EPA suggests. Indeed, every court that has squarely considered the issue has decided that the doctrine applies to individual TMDLs. The first constructive submission case, the *Scott* case, concerned specific TMDLs, not a statewide failure. In *Scott*, EPA had failed to issue TMDLs for pollutants in just one waterbody—Lake Michigan—after Illinois and Indiana failed to do so. 741 F.2d at 996–97. Since then, three courts specifically considered whether the doctrine applies only to programmatic challenges to a state's TMDL program, or whether it also applies to particular TMDLs, and all three courts agreed that the doctrine applies to individual TMDLs too. *See Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522, at *6–*7 (W.D. Wash. Mar. 16, 2015); *Ohio Valley Envt'l. Coal. v. McCarthy*, No. 3:15-0271, 2017 WL 600102, at *9–*10 (S.D. W.Va. Feb. 14, 2017); *Las Virgenes Muni. Water Dist. v. McCarthy*, No. C 14-01392 SBA, 2016 WL 393166, at *7 (N.D. Cal. Feb. 1, 2016). When this Court issued its Order on summary judgment, it followed this precedent.

EPA also argues that, even if the Court correctly found a constructive submission, serious jurisdictional questions remain about the relief the Court ordered. This is not true: the Court ordered precisely what the Clean Water Act requires and nothing more. Section 303(d)(2) of the CWA states that, upon submission of a TMDL, EPA "shall either approve or disapprove such [TMDL] not later than thirty days after the date of submission," and, if EPA disapproves the TMDL, then EPA "shall not later than thirty days after the date of such disapproval" issue a

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substitute TMDL. 33 U.S.C. § 1313(d)(2). Here, the Court—after finding a constructive submission—ordered EPA to either approve or disapprove the TMDL within 30 days and ordered EPA, after disapproving the TMDL, to issue a replacement TMDL within 30 days. Because the Court's relief does nothing more than simply restate what the CWA explicitly requires, EPA cannot maintain that this relief gives rise to serious questions of law.

Finally, EPA argues that, if it fails to issue a timely TMDL, Riverkeeper would have to send EPA a CWA notice letter, wait sixty days, and then bring a new action to give this Court jurisdiction over EPA's violation. That is incorrect and just another delay tactic. Riverkeeper's notice letter[1] specifically alleged a violation of EPA's mandatory CWA duty to promulgate the temperature TMDL, and Riverkeeper also made this claim in its Complaint. *See Notice of Intent to Sue*, Dkt. # 29-3 (notifying EPA of intent to bring suit over the agency's failure to "issue" the TMDL); *see also Complaint*, Dkt. # 1, ¶ 50 (alleging EPA failed to perform CWA mandatory duties, including to "prepare a TMDL within 30 days"). EPA's attempt to spawn additional litigation and propagate unnecessary delay is simply wrong.

III. EPA Will Not Suffer Irreparable Harm Without a Stay.

EPA argues that it can demonstrate irreparable harm because, if EPA complies with the Court's order by issuing the TMDL, the Ninth Circuit *might* find the appeal moot. *See* Dkt. # 47 at 5. This is not enough. Irreparable injury must be certain to occur in order to justify a stay pending appeal; the mere possibility of such injury is not sufficient. *Nken*, 556 U.S. at 434. EPA expresses "uncertainty" about whether complying with the Court's order, and issuing the TMDL, would moot the appeal. Dkt. # 47 at 5. If EPA *itself* cannot decide whether its appeal would be

[1] Contrary to EPA's assertions (Dkt. # 47 at 5), Riverkeeper was not prohibited from noticing this claim in 2016, *see Citizens for a Better Environment — California v. Union Oil Co. of California*, 861 F. Supp. 889, 912 (N.D. Cal. 1994) *aff'd* 83 F.3d 1111 (9th Cir. 1996) (approving a notice letter for a prospective or threatened CWA violation), and Riverkeeper clearly has standing to pursue this claim because EPA has disapproved the states' submissions.

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mooted, EPA cannot demonstrate the level of certain harm required to obtain a stay. *Cf. Nken*, 556 U.S. at 434.

Moreover, EPA obviously intends to attempt to avoid mootness at the Ninth Circuit by claiming EPA would not have issued the TMDL "if it had not been ordered to do so by the district court." *See, e.g.,* Dkt. # 47-1 at 2. In its disapproval letters to Washington and Oregon, EPA stated that the disapprovals were made pursuant to the Court's order and purported to "expressly reserve[] the right to withdraw or revise this action in whole or in part if it obtains a judicial decision on appeal that relieves the EPA of the obligations in the district court's October 17, 2018, order." *Id.* This further undercuts EPA's claim that mootness, and any alleged injury that could flow from mootness, is certain to occur.

EPA also asserts that complying with the Court's order could force a hurried TMDL process, disrupt EPA's other CWA priorities, and interfere with public input. *See generally* Dkt. # 47 at 6–7. But these alleged injuries are self-inflicted. As this Court already found, EPA "created the very problem" of which it complains. *See* Dkt. # 30 at 2 (Order Denying EPA's Motion to Suspend Briefing Schedule). Between 2000 and 2003, EPA prioritized and developed a temperature TMDL and engaged in a robust public process that brought the TMDL to the brink of finalization. In 2003, before abandoning the TMDL, EPA had in place all of the elements of the very TMDL process that EPA now claims to be deprived of. Having created these so-called injuries by deliberately refusing to finalize the TMDL in 2003—even when possessing ample time and public process—EPA is not entitled to equitable relief now through a stay.

EPA also argues it will face "significant hardship" if forced to issue the TMDL soon, pointing out that EPA typically spends three to five years creating each TMDL. Dkt. # 47 at 6. EPA ignores the years EPA spent drafting this TMDL that was nearly final in 2003 and ignores the fact that EPA has been working since early 2017 to update the TMDL. *See, e.g.*, Soscia Decl.

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(Dkt. # 32) at ¶ 5 (describing EPA's work since early 2017 to identify tasks needed to resume work on the TMDL and work already underway). EPA has worked on this TMDL far longer than the typical three to five years, and any hardship caused by finalizing the TMDL over the next month would not be significant.

EPA's alleged hardships do not rise to a level that "threaten[s EPA's] mission or operations . . . ." *NRDC, Inc. v. USFDA*, 884 F.Supp.2d 108, 125 (S.D.N.Y. 2012). EPA's suggestion (Dkt. # 47 at 6) that focusing on the temperature TMDL for the next few weeks would appreciably harm other ongoing multi-year TMDL processes is illogical. And while EPA might prefer to hold a year-long public comment period before issuing the TMDL, EPA cannot show how it is irreparably harmed without one; a Draft TMDL was released for public comment more than a decade ago, and most stakeholders have been aware of this lawsuit and EPA's renewed work on the temperature TMDL since late 2016. Lastly, EPA's claim that issuing the TMDL within 30 days will interfere with EPA's ability "to coordinate implementation of the TMDL before issuance" (Dkt. # 47 at 7) puts the cart before the horse and fails to show how EPA would be irreparably harmed if such coordination is delayed by a few weeks.

Finally, the hardships that EPA complains of are not even cognizable as irreparable injuries. Merely complying with federal law by issuing the TMDL—an action for which EPA has repeatedly claimed responsibility—cannot constitute the type of irreparable injury that justifies the "extraordinary remedy" of a stay pending appeal. *Bhd. of Railway & Steamship Clerks*, 374 F.2d at 275. If the unquantified, undefined "economic losses" (Dkt. # 47 at 6) associated with EPA briefly re-prioritizing its workload to comply with the CWA and the Court's order were irreparable injuries, stays pending appeal would become almost universally available to federal defendants. *Cf. NRDC*, 884 F.Supp.2d at 134. But a federal agency's argument "that potentially wasted and diverted staff resources constitute an 'irreparable harm' . .

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. is meritless." *Shays v. FEC*, 340 F.Supp.2d 39, 48 (D.D.C. 2004*). Accord Ctr. for Food Safety v. Hamburg*, No. C-12-4529-PJH, 2013 WL 5718339, at *2 (N.D. Cal. Oct. 21, 2013); *NRDC*, 884 F.Supp.2d at 124. There is nothing "extraordinary," *NRDC*, 884 F.Supp.2d at 134, about potentially re-assigning staff to promptly comply with a court order.

IV. The Balance of Equities & the Public Interest Tip in Riverkeeper's Favor.

EPA also fails to show that it meets the final two requirements for the extraordinary remedy of a stay pending appeal: that the balance of the equities tips in EPA's favor and that a stay pending appeal is in the public interest.

Riverkeeper's harm stems from environmental injury which, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987). The thirteen species of threatened and endangered Columbia and Snake River salmon and steelhead remain in a precarious state. Dkt. # 39 at 2. In 2015, warm water killed roughly 96 percent of the endangered Snake River sockeye salmon migrating up the Columbia and lower Snake Rivers. Dkt. # 27-9 at 3. In response to that catastrophe, EPA admitted that such problems are likely to get worse due to climate change and that action to address water temperature is critical to protecting salmon and steelhead. Dkt. # 27-12 at 1.

The small burden EPA faces in taking quick action to finish issuing the long-overdue temperature TMDL pales in comparison to the ongoing risk of extinction facing Columbia River salmon and steelhead and the associated risks to jobs and cultures throughout the Pacific Northwest. The balance of the equities, thus, tips in Riverkeeper's favor.

Finally, the public interest lies in expeditious compliance with the CWA to protect important fish species and water quality—not in further administrative foot dragging to avoid dealing with challenging problems. Forestalling compliance even longer would only further harm

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Boise, ID 83701
(208) 342-7024

the public interest. *See Apotex, Inc. v. USFDA*, 508 F.Supp.2d 78, 88 (D.D.C. 2007) ("When administrative agencies fail to follow statutory procedures, the public suffers."). With regard to TMDLs, "the public interest is best served by prompt action, even any meaningful action, on the part of the State and the EPA to comply with the [CWA's] charge." *Friends of the Wild Swan v. EPA*, 130 F.Supp.2d 1207, 1213 (D. Mont. 2000). Consequently, a stay is contrary to the public interest.

CONCLUSION

In sum, EPA cannot show it meets the four requirements, and the Court should deny EPA's motion for stay pending appeal.

RESPECTFULLY SUBMITTED this 28th day of November, 2018.

By: */s/ Miles Johnson*
Miles Johnson (WSBA #50741)
COLUMBIA RIVERKEEPER
407 Portway Ave., Suite 301
Hood River, OR 97031
(541) 490-0487
miles@columbiariverkeeper.org

Bryan Hurlbutt (*pro hac vice*) (ISB #8501)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024 x206
bhurlbutt@advocateswest.org

Richard A. Smith (WSBA # 21788)
SMITH & LOWNEY, PLLC
2317 East John St.
Seattle WA 98112
(206) 860-2883
richard@smithandlowney.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Chloe H. Kolman
chloe.kolman@usdoj.gov

Sarah Ann Buckley
sarah.buckley@usdoj.gov

/s/ Miles Johnson
MILES JOHNSON

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024